No. 127.

Brief of Kirlin for Appt.

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SUPREME COURT OF THE UNITED STATES

October Term, 1899

No. 127

The Steamship Panama,
Manuel Quevedo
*Claimant-Appellant*

*against*

The United States
*Libelant-Appellee*

BRIEF FOR THE PANAMA

CONVERS & KIRLIN
*Proctors for Claimant-Appellant*

J. PARKER KIRLIN
*Advocate*

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

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| The Steamship PANAMA, MANUEL QUEVEDO, Claimant-Appellant, AGAINST THE UNITED STATES, Libelant-Appellee. | No. 127. (Prize.) |

## BRIEF FOR THE PANAMA.

### Statement.

This is an appeal from a decree of the District Court of the United States for the Southern District of Florida, entered May 27, 1898, under which the steamship *Panama* was condemned as lawful prize of war (Rec., p. 9).

The ground of the condemnation, as stated in the final decree, was:

"That the said steamer *Panama* is enemy's property, and was upon the high seas at the time of the President's proclamation exempting certain vessels from arrest" (p. 9).

The proofs upon which the condemnation rests consist of the answers given by Raymon Burgas, Purser, by Gaspar Thompson, Chief Engineer, and by Manuel Quevedo,

the Master of the *Panama*, to the standing interrogatories, and of the documents seized on board the ship by the captors.

There was also filed with the papers an affidavit, made before one of the Prize Commissioners, by Gabriel Reyna, a passenger on the *Panama*, which, though printed in the transcript, is not properly a part of the record (*The Aliŭe and Fanny*, Spink's Pr. Cas., at p. 329; The *Dos Hermanos*, 2 Wheat., 76).

The original documents, which have been certified to this Court by the Court below, are voluminous, and were not attached to the transcript of the record on appeal. For that reason they have not been printed.

From the evidence produced it appears that the *Panama* was a Spanish merchant vessel of 1,432 tons register (Burgas, Ans. to 5th Int., p. 23), owned by the *Campania Trasatlantica*, a corporation of Barcelona. She carried a crew of seventy one men all told. Her usual trade was between New York and Vera Cruz, and other Mexican ports, *via* Havana (Ansrs. to 7th and 8th Ints., pp. 21-23, 27-31), with general cargoes, passengers and the mails.

In accordance with a mail contract with the Spanish government, she carred two breech loading nine-centimeter Hontoria guns, one Maxim rapid-fire gun, and two saluting guns, besides a quantity of small arms (Ans. to 31st Int., p. 33). The large guns had been mounted about three years before, and the small arms had been shipped about one year before the capture (Ans. to 31st Int.). The guns were not, however, fitted for action (Test. Aff., p. 5).

The *Panama* cleared at the Custom House in New York with a general cargo, twenty-nine passengers and the United States mails, on April 20, 1898. She had been consigned at New York to Juan M. Ceballos, a native-born American citizen, under whose agency she was laden and despatched (p. 5.)

The voyage was from New York to Vera Cruz *via* Havana. The clearance issued by the Collector of the Port of New York on April 20th, was in these terms (Original on file):

"Sec. 4201, Rev. Stats. N. Y. Cat. No. 490.

"*The United States of America.*

"*Clearance of Vessel to a Foreign Port.*

"District of the City of New York,
Port of NEW YORK.

"THESE ARE TO CERTIFY ALL WHOM IT DOTH CONCERN:

"That Ml. Quevedo, Master or Commander of the Spn. St. PANAMA, burden 1470 Tons, or thereabouts, mounted with.....Guns, navigated with 71 Men.....f'rgn..... built and bound for Havana, Progreso, Veracruz, having on board.....MERCHANDISE and STORES, hath here entered and cleared his said vessel, according to law.

"Given under our hands and seals, at the Custom House of the Port of New York, this 20th day of April, one thousand eight hundred and ninety-eight, and in the 122d year of independence of the United States of America.

"J. C. SAGE, T. RAYMOND,
"Deputy Naval Officer. Deputy Collector."

The first entry in the log for April 20th (original on file) reads:

"Sailed from New York for Havana at 2.30 *with the mails*, a pilot and passengers on board. Left the wharf and proceeded in charge of pilot, clearing the channel at 3.56. Pilot left us when abreast of Scotland Lightship."

It appears from the log that the steamer pursued the usual course of vessels bound south along the coast, until she passed Alligator Reef light, and then bore off for Havana.

Barnegat light was passed distant 6½ miles on the evening of the 20th. The customary course was pursued thence to Cape Hatteras, where the fixed light and the lightship were both sighted on the 21st. From this point the course was laid to Jupiter, which was sighted on the 23d, and passed in

the twenty-second hour, seven miles distant. The record of the last watch on the 23d [by land time, 8 A. M. to 12 M. of the 24th], states:

"In sight of Jupiter Light, which we passed at 21.45 [9.45 A. M.], 7 miles distant, and continued along the coast with fresh south wind, with same sea, weather cloudy. *Passed the Hotel 3 miles distant* at 23.40 [11.40 A. M.], and at 12 M. it bore N. 53 West, distant 5 miles."

The log entry for the 24th is as follows:

"We commence this day on usual course *in sight of the Florida coast*. At 1.42 were in true E. W. line with first Refugio. Wind south, smooth sea, and clear sky. At the fourth hour left the watch with nothing new."

"4th to 8th hour: *Course convenient to the coast and near to same*. Night came with Fowey in sight. So on to the eighth hour.

"8th to 12th hour: Sailing within sight of Fowey, *which we passed at tenth hour distant 3 miles*. At eleven we sighted the Carrisfort Light, and continued the course of the canal. Wind light from south, smooth sea, and clear. At twelfth hour left watch.

"12th to 16th hour: Course following the coast with Fowey and Carrisfort Lights in sight. South wind, smooth sea. Passed Carrisfort at 12.38 distant 4 miles; and at 15.38 sighted Alligator bearing S. W. on fore quarter. Left watch at sixteenth hour without anything further to record.

"16th to 20th hour: At 16.35 we passed Alligator N. 50 W., distant 10 miles. Day broke clear and all well to twentieth hour.

"20th to 24th hour: Continued on course indicated, with light north-east wind and cloudy. At noon on the apparent meridian by observation we found our location West 79° 18'.

Entry for April 25th:

"We commence this day with course as noted, light west- northwest wind, smooth sea, clear, and in sight of Cuban coast, directly north of Matanzas Mountain at 2 20. At fourth hour passed the watch.

"4th to 8th hours: Continued in sight of Cuba bound to Havana. At 5.30 we sighted three war vessels. At 5.40 the nearest one bore down on us, showing the American flag. We at once

showed our national colors, and on coming nearer found the vessel to be the *Mangrove*. At 5.50 she fired a gun blank shot, and we stopped the engines. Latitude, 23° 21′ North; longitude, 75° 47′ West * * * from San Fernando and 25 miles from the Havana Morro. At 5.55 she again fired, this time with ball, and approached to speak to us. At 6.10 she lowered a boat, in which came an officer, who remained on board, and who informed us that Spain had declared war against the United States and that we were his prisoners. When this officer came on board the *Mangrove* fired a third shot with ball, and at 6.20 ordered us to proceed slowly towards the *Indiana*. At 6.50, and one mile away, she again fired with ball, and we stopped. She approached nearer to speak to the officer. At 7.40 we were boarded by an officer from the *Indiana*, one sergeant and ten soldiers of marine infantry and five sailors, who took charge of management of the vessel."

The log then records that the steamer proceeded in the wake of the *Mangrove* into Key West, where she came to anchor at ten o'clock, A. M., April 26, 1898.

The log further states that at 11.15 on the 25th, "the officer asked for the key of the *mail room*, which was delivered to him."

It appears from the log, and was testified in answer to the standing interrogatories, that the steamer made no resistance at the time of her capture, which was effected by a converted lighthouse tender (Ansrs. to 3rd Int., pp. 22, 26, 30). There was not known to be any military or naval officers amongst the passengers (Ansrs. to 26th Int., pp. 24, 28, 32); and the ship carried no arms or munitions of war except the mounted guns without breeches (Test Aff., p. 5, above referred).

The steamer was libeled in the District Court for the Southern District of Florida on the 26th of April, 1898 (Rec., p. 1). The libel alleged that the *Panama* and her cargo had been captured on the high seas by the United States ship of war *Mangrove* on April 25th, and had been brought into the port and harbor of Key West, within the jurisdiction of the court; and that both were lawful prize of war, and subject to be condemned and forfeited to the United States as such (Rec., p. 1).

Process under the libel was executed on the same day, by reading the original to the master and posting two copies (Rec., p. 3). This process cited and admonished "all persons whomsoever, having any right, title, claim, or interest, in or to the said steamer *Panama*, to appear at an admiralty session of this Court, to be held in the court-rooms of said Court, at Key West, in said district, on Wednesday, the 11th day of May, A. D. 1898, at 10.30 o'clock in the forenoon of that day, to show cause, if any they have, why it should not be decreed according to the prayer of the libel, and to attend upon every session of said Court from that time held until a final decree shall be rendered in the premises" (Rec., p. 3).

The time for the presentation of claims having been extended, the master of the *Panama*, Manuel Quevedo, intervening as bailee for the interest of the owner, filed a claim to the vessel on May 18, 1898, denying that she was lawful prize, and praying that she be restored, with damages and costs (p. 4).

On the same day the master filed a test affidavit, and on May 24th, by leave of the Court, a supplementary test affidavit, in which the circumstances of the voyage and of the capture were set forth, the provisions of the mail contract above referred to were stated, and the suggestion was made that the vessel was exempt from capture and condemnation by the terms of a proclamation issued by the President on April 26, 1898, and by the general prize law as administered in the United States (pp. 5–8).

The circumstances which led up to this capture appear in certain acts of the Congress and of the Executive Departments of the Government, to which it will be convenient here to refer.

On April 20, 1898, the Congress passed, and the President approved, the following joint resolution:

"(No. 24.) Joint resolution for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing

the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.

"Whereas the abhorent conditions which have existed for more than three years in the Island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battle ship, with two hundred and sixty six of its officers and crew, while on a friendly visit in the harbor of Havana, and cannot longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited: Therefore,

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

"FIRST.—That the people of the Island of Cuba are, and of right ought to be, free and independent.

"SECOND.—That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

"THIRD.—That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

"FOURTH.—That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people."

"Approved April 20, 1898" (30 *Stat. at Large* Pt. II., p. 738).

Upon this resolution being communicated to the Spanish Minister in Washington, he immediately demanded his passports in the following letter:

"WASHINGTON, April 20.

"MR. SECRETARY:

"The resolution adopted by the Congress of the United States of America and approved to-day by the President is of such a nature that my permanence in Washington becomes impossible, and obliges me to request of you the delivery of my passports. The protection of the Spanish interests will be intrusted to the French Ambassador and to the Austro-Hungarian Minister. On this occasion, very painful to me, I have the honor to renew to you the assurances of my highest consideration.

"LOUIS POLO Y BERNABÉ."

"To HON. JOHN SHERMAN,
Secretary, &c.

(*Foreign Relations*, 1898).

On the same day, the Secretary of State sent the Spanish Minister his passport, in the following words:

"UNITED STATES OF AMERICA, DEPARTMENT OF STATE.

"*To all to Whom These Presents Shall Come.*

"GREETING: Know ye that the bearer hereof, Senor Don Louis Polo y Bernabe, Envoy Extraordinary and Minister Plenipotentiary of Spain to the United States, is about to travel abroad, accompanied by his family and suite. These are therefore to request all officers of the United States, or any State thereof, to permit him to pass freely, without let or molestation, and to extend to him all friendly aid and protection in case of need.

"In testimony whereof, I, John Sherman, Secretary of State of the United States of America, have hereunto set my hand and caused the seal of the Department of State to be affixed at Washington this twentieth day of April, A. D. 1898, and of the independence of the United States of America the one hundred and twenty-second.

[SEAL.] "JOHN SHERMAN."

On April 20, 1898, the text of the above resolution of Congress, passed on that day, was cabled to the United States Minister at Madrid, together with the following despatch:

"To WOODFORD, Minister, Madrid:

"You have been furnished with the text of a joint resolution voted by the Congress of the United States on the 19th inst., approved to day, in relation to the pacification of the island of Cuba. In obedience to that act the President directs you to immediately communicate to the Government of Spain said resolution, with the formal demand of the Government of the United States that the Government of Spain at once relinquish its authority and government in the island of Cuba and Cuban waters. In taking this step, the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island, except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people, under such free and independent government as they may establish.

"If by the hour of noon on Saturday next, the 23d of April, instant, there be not communicated to this Government by that of Spain a full and satisfactory response to this demand and resolution whereby the ends of peace in Cuba shall be assured, the President will proceed without further notice to use the power and authority enjoined and conferred upon him by the said joint resolution to such extent as may be necessary to carry the same into effect.

"SHERMAN."

(*Foreign Relations*, 1898).

On April 20th the *Panama* was granted a clearance, in due form, by the Collector of the Port of New York, and shortly after noon sailed for Havana and ports in Mexico with the United States mails.

The reply of the Minister at Madrid to the above message was received on April 21, 1898:

"SHERMAN, Washington:

"Early this (Thursday) morning, immediately after the receipt of your open telegram, and before I had communicated same to Spain, the Spanish Minister of Foreign Affairs notified me that the diplomatic relations are broken between the two countries, and that all official communications between their respective representatives have ceased. I accordingly asked for safe passports. Turn legation over to British Embassy and leave for Paris this afternoon. Have notified Consuls.

"WOODFORD."

(*Foreign Relations*, 1898).

The letter from the Spanish Minister of Foreign Affairs, to which reference is made in the foregoing telegram, was in these words:

"MADRID, April 21, 1898.

"Hon. STEWART L. WOODFORD,

"Minister of the United States of America.

"Dear Sir: In compliance with a painful duty I have the honor to inform Your Excellency that the President having approved a resolution of both Chambers of the United States, which in denying the legitimate sovereignty of Spain and threatening an immediate armed intervention in Cuba, is equivalent to an evident declaration of war, the Government of His Majesty has ordered its Minister in Washington to withdraw without loss of time from the North American territory, with all the *personnel* of the Legation.

"By this act the diplomatic relations which previously existed between the two countries are broken off, all official communications between their respective representatives ceasing, and I hasten to communicate this to Your Excellency in order that on your part you may make such dispositions as seem suitable.

"I beg Your Excellency to acknowledge the receipt of this note at such time as you deem proper, and I avail myself of this opportunity to reiterate to you the assurances of my distinguished consideration.

"P. GULLON."

(*Foreign Relations*, 1898).

On this date instructions were given by the Secretary of the Navy to the Commander-in-Chief of the North Atlantic squadron to blockade certain ports in Cuba:

"WASHINGTON, April 21, 1898.

"SIR,—The Department's instructions of April 6 are modified as follows: You will immediately institute a blockade of the north coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west; also, if in your opinion your force warrants, the port of Cienfuegos, on the south side of the island. It is considered doubtful if the present force at your command would warrant a more extensive blockade.

"It should be borne in mind that whenever the Army is ready to embark for Cuba the Navy will be required to furnish the necessary convoy for its transports. For this reason it does not seem desirable that you under-

take at present to blockade any more of the island than has been indicated. It is believed that this blockade will cut off Havana almost entirely from receiving supplies from the outside.

"The Navy Department is considering the question of occupying the port of Matanzas by a military force large enough to hold it and to open communications with the insurgents, and this may be done at an early date, even before the main party of the Army is ready to embark. If this operation is decided upon, you are directed to co-operate with the Army and assist with such vessels as are necessary to cover and protect such a movement.

"If you obtain any information of the movements of Spanish ships of war in any part of the West Indies, you will, if practicable, inform the Department by telegraph of such movements.

"In conducting such other operations as you may deem desirable, you will be governed by the instructions contained in the Department's letter of April 6.

"The Department does not wish the defenses of Havana to be bombarded or attacked by your squadron.

"Very respectfully,

JOHN D. LONG,
Secretary.

"Commander in Chief,
"U. S. Naval Force, North Atlantic Station."

(*Appendix to the report of the Chief of the Bureau of Navigation*, 1898, p. 175.)

On April 22d the President publicly proclaimed this blockade:

"*By the President of the United States:*

A PROCLAMATION.

"Whereas, by a joint resolution passed by the Congress and approved April 20, 1898, and communicated to the government of Spain, it was demanded that said government at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters, and the President of the United States was directed and empowered to use the entire land and naval forces of the United States and to call into the actual service of the United States the militia of the several States to such an extent as might be necessary to carry said resolution into effect; and

"Whereas, in carrying into effect said resolution, the President of the United States deems it necessary to set on foot and maintain a blockade of the north coast of

Cuba, including all the ports on said coast between Cardenas and Bahia Honda, and the port of Cienfuegos, on the south coast of Cuba:

"Now, therefore, I, William McKinley, President of the United States, in order to enforce the said resolution, do hereby declare and proclaim that the United States of America have instituted and will maintain a blockade of the north coast of Cuba, including ports on said coast between Cardenas and Bahia Honda and the port of Cienfuegos, on the south coast of Cuba, aforesaid, in pursuance of the laws of the United States and the law of nations applicable to such cases. An efficient force will be posted, so as to prevent the entrance and exit of vessels from the ports aforesaid. Any neutral vessel approaching any of said ports or attempting to leave the same without notice or knowledge of the establishment of such blockade will be duly warned by the commander of the blockading forces, who will indorse on her register the fact and the date of such warning, where such indorsement was made; and if the same vessel shall again attempt to enter any blockaded port she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo as prize, as may be deemed advisable.

"Neutral vessels lying in any of said ports at the time of the establishment of such blockade will be allowed thirty days to issue therefrom.

"In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed. Done at the City of Washington this 22d day of April, A. D. 1898, and of the Independence of the United States the one hundred and twenty-second.

"WILLIAM MCKINLEY.

"By the President.

"JOHN SHERMAN,

"Secretary of State."

The blockade was instituted on April 22d. (*Appendix to Report of the Chief of the Bureau of Navigation*, 1898, pp. 167–8).

On April 23d the Spanish Royal decree was issued, in which it was said:

"ART. I. The state of war existing between Spain and the United States terminates the Treaty of Peace and Friendship of the 27th October, 1795, the Protocol of the 12th January, 1877, and all other agreements, compacts

and conventions in force up to the present between the two countries" (*Gaceta de Madrid*, 24 Apl., 1898; *London Gazette*, May 3, 1898).

On April 25th, the President addressed a message to the Congress, with which he transmitted "for its consideration and appropriate action" the foregoing correspondence between the State Department and its Minister and between the latter and the Spanish Minister of Foreign Affairs, and a notification that he had declared a blockade of certain Cuban ports, adding:

"In view of the measures so taken, and with a view to the adoption of such other measures as may be necessary to enable me to carry out the expressed will of the Congress of the United States in the premises, I now recommend to your Honorable body the adoption of a joint resolution declaring that a state of war exists between the United States of America and the Kingdom of Spain, and I urge speedy action thereon, to the end that the definition of the international status of the United States as a belligerent power may be made known and the assertion of all its rights and the maintenance of all its duties in the conduct of a public war may be assured" (*Messages and Papers of the Presidents*, Vol. 10, p. 154).

On the same day the Congress passed, and the President approved the following:

"AN ACT DECLARING THAT WAR EXISTS BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF SPAIN.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:*

"FIRST.—That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, *anno domini* eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

"SECOND.—That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry this Act into effect.

"Approved April 25, 1898."

(30 *Stat. at Large, Pt.* 2, *Ch.* 189.)

On April 26th, 1898, the President issued the proclamation of war referred to in the claim and test affidavit herein, which was in these terms:

[No. 8.]

"*By the President of the United States of America*:

"A PROCLAMATION.

"WHEREAS, by an act of Congress, approved April 25, it is declared that war exists and that war has existed since the 21st day of April, A. D. 1898, including said day, between the United States of America and the Kingdom of Spain; and

"WHEREAS, it being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, it has already been announced that the policy of this government will be not to resort to privateering, but to adhere to the rules of the Declaration of Paris:

"Now, therefore, I, William McKinley, President of the United States of America, by virtue of the power vested in me by the Constitution and the laws, do hereby declare and proclaim:

"1. The neutral flag covers enemy's goods, with the exception of contraband of war.

"2. Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag

"3. Blockades in order to be binding must be effective.

"4. Spanish merchant vessels in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places, and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; *provided*, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government.

"5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port, bound for any port or place in the United States, shall be permitted to enter such port and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.

"In witness whereof I have hereto set my hand and caused the seal of the United States to be affixed.

"Done at the City of Washington, on the twenty-sixth day of April, in the year of our Lord [SEAL.] one thousand eight hundred and ninety-eight, and of the independence of the United States the one hundred and twenty-second.

"WILLIAM MCKINLEY.

"By the President.

"ALVEY A. ADEE,

"Acting Secretary of State."

(30 *Statutes at Large*, p. 1770.)

On the day the foregoing proclamation was issued (April 26th) the *Panama* was in the port of Key West, and was not within the class of vessels excluded from the privileges and immunities granted by the Fourth Section thereof.

The *Panama* was a mail steamer, and was further entitled to immunity under the 6th Section of the Proclamation. She had taken the United States mails at New York (Log, April 20th), and delivered them over to the captors (Ans. to 24th Int., p. 32) on the night of her capture (Log, April 25th, second watch).

The cause was heard below by the Hon. James W. Locke, District Judge, in the latter part of May, 1898, and was decided in an oral opinion delivered May 27th (p. 11), which also disposed of the cases of the *Buena Ventura*, *Catalina*, *Miguel*, *Jover*, *Pedro* and *Guido*, and their cargoes. The opinion of the Judge was subsequently reduced to writing, and was filed July 13th (p. 34).

It appears from the opinion and from the decree that the sole ground of condemnation was the enemy character of the vessel, and her exclusion from the immunity granted by the Fourth Article of the Proclamation, by reason of the fact, as the Court held, that she was not in a port or place of the United States on April 21st, the date on which this section was deemed to have become operative.

The vessel was sold under the final decree entered on May 27th (pp. 9–11), and her proceeds were deposited to abide the event of this appeal. Some of the cargo belonging to citizens and neutrals was released, and some of it was condemned.

The Court on May 27th denied the claimant's motion for leave to take further and additional proofs respecting the matters set forth in the test affidavit and supplementary test affidavit (p. 8).

The claimant Manuel Quevedo duly appealed to this Court from that part of the decree which condemned the ship, and assigned the following errors (p. 112):

"1st. For that the Court held and decided that the *Panama* was lawful prize of war.

"2d. For that the Court omitted and refused to hold that the *Panama* was not lawful prize of war.

"3d. For that the Court omitted and refused to find that the *Panama* was privileged and exempt from capture and condemnation as prize under and by virtue of the president's proclamation issued April 26, 1898.

"4th. For that the Court omitted and refused to find that the *Panama* was exempt from capture and condemnation by reason of the fact that her cargo had been taken on board in, and she had sailed from, a port of the United States prior to May 21, 1898.

"5th. For that the Court omitted and refused to hold that the vessel was privileged and exempt from condemnation by reason of the fact that she was in a port or place of the United States on April 26, 1898, and was not within the classes of vessels excepted from the priviledges accorded by the Fourth Article of the Proclamation.

"6th. For that the Court omitted and refused to allow further proofs of the matters set up in the test affidavit and supplementary test affidavit."

## I.

### The Panama was exempt from condemnation by the terms of the 4th section of the Proclamation of April 26th, 1898.

The parts of the proclamation material to this point are:

"Whereas, it being desirable that such war should be conducted upon principles in harmony with the present views of nations as sanctioned by their recent practice, it has already been announced that the policy of this government will be not to resort to privateering but to adhere to the rules of the Declaration of Paris;

"Now, therefore, I, WILLIAM M'KINLEY, President of the United States of America, by virtue of the power vested

in me by the constitution and laws, do hereby declare and proclaim. * * *

"4. Spanish merchant vessels in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places, and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; *provided*, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government. * * *

"Done at the City of Washington, on the *twenty-sixth* day of April, in the year of our Lord one [SEAL.] thousand eight hundred and ninety-eight, and of the independence of the United States the one hundred and twenty-second.

"WILLIAM MCKINLEY.

"By the President,

"ALVEY A. ADEE,

"Acting Secretary of State."

(30 *Statutes at Large*, p. 1770.)

On April 26th the *Panama* was in the port of Key West, "a port * * * within the United States," and was not within the proviso. It is contended, therefore, that she was within the specific terms of the Proclamation, and hence exempt from condemnation.

The construction of this provision by the Court below was this:

"Giving the introductory language of the Proclamation the force to which I consider it is entitled, I feel compelled to hold that the intention of the Executive was to fully recognize the recent practice of civilized nations, and not

to sanction or permit the seizure of the vessels of the enemy within the harbors of the United States at the time of the commencement of war, or to permit them to escape from ports to be seized immediately on entering upon the high seas, and that the fourth article should be held to apply to all Spanish merchant vessels in the harbor of the United States *upon April* 21, 1898, and exempt them from seizure" (Opinion, p. 38).

The grounds upon which the District Judge rested his decision condemning the *Panama* are as follows:

"The *Panama* sailed from New York before the 21st of April, 1898, and was upon the high seas at that time and at the time of capture. The fact that there had been no formal declaration of war before she had sailed, or at the time she was captured, or that she had at a recent date left a port of the United States, cannot be considered as exempting her from the liability of all enemy's property to capture unless coming directly within the language of the President's proclamation.

"The practice of a formal proclamation before recognizing an existing war and capturing enemy's property has fallen into disuse in modern times, and actual hostilities may determine the date of the commencement of war, although no proclamation may have been issued, no declaration made, or no action of the legislative department of the Government had. This date has been declared by the Act of Congress of April 25, 1898, and by the proclamation of the President of the next day to have been April 21, 1898, including that day; so that any Spanish property afloat captured from that time became liable to condemnation unless exempt by the Executive proclamation."

From these passages in his opinion it is seen that the forfeiture of the *Panama* was reached by giving retroactive effect to this section of the proclamation, making it apply to vessels in our ports on April 21st, and excluding from its privileges the vessels in United States ports on the day of its issue, April 26, which were not in such ports on April 21st.

Such construction is contrary to the general rule that proclamations take effect only at their date, and violates

the principle that all relaxations of belligerency are to be construed in favor of and not against the interests of those for whose benefit they are designed.

If effect had been given this section of the proclamation as of the day of its date, not only the *Miguel Jover* and *Catalina*, which sailed from New Orleans on April 21st, but also the *Panama* which left New York on April 20th, the *Buena Ventura*, which departed from Ship Island on April 19th, would all have been released; for all were in Key West on that day.

By such a result fair and honorable to the Government, and authorized by the terms of the proclamation, the injustice and inequality of releasing some and condemning others, where all are equally innocent and entitled to similar treatment, would have been avoided, and the practices of the United States would have more nearly accorded with its time-honored and most public professions.

(**1**.) Force and effect should be given to the fourth article of the proclamation as of the day of its date.

(**a**.) Unless the contrary is stated on the face of a proclamation, it is undoubtedly the general rule that it takes effect from the date of its issue (*Lapeyre* v. *United States*, 17 Wallace, 191; *U. S.* v. *Norton*, 97 U. S., 170; *De Bow* v. *U. S.*, 11 Ct. Cl., 676).

In *Lapeyre* v. *U. S.* (*supra*) Mr. Justice Strong said:

"The only inquiry presented for our consideration is when the proclamation which is the hinge of this controversy, took effect. * * * There is no Act of Congress, and nothing to be found in American jurisprudence, which bears very directly on the subject" (p. 195). "A very careful and learned English writer (*Chitty on Prerogatives*, 106) says: 'A proclamation must be under the great seal, and if denied, *is to be tried by the record thereof.*' * * * Under the circumstances it may be well to look to the analogy afforded by the promulgation of statutes" (p. 196). "We know that the established usage is to publish proclamations, with the laws and resolutions of Con-

gress, concurrently in the newspapers and in the same volume with those laws and resolutions at the end of the session. There is no statute fixing the time when Acts of Congress shall take effect, but it is settled that where no other time is prescribed, they take effect from their date (*Matthews* v. *Zane*, 7 Wheat., 211). * * * The date is an unvarying guide. If that be departed from, the subject may be one of indefinitely recurring litigation" (p. 199). "The only way to guard against these mischiefs is to apply the same rule of presumption to proclamations that is applied to statutes, that is, that they had a valid existence on the day of their date, and to permit no inquiry upon the subject. * * * If the proclamation here involved were a resolution or an act of Congress, no such question could arise. That 'a proclamation * * * if denied, *is to be tried by the record thereof*,' and that in such case the proper plea is *nul tiel record*, seems to be conclusive upon the subject.

"It would be unfit and unsafe to allow the commencement of the effect whenever the question arises, whether at a near or a distant time, to depend upon the uncertainty of parol evidence, or upon anything extrinsic to the instrument itself, as found in the archives of the nation" (p. 200).

*Wheaton, Maritime Captures and Prizes* (p. 299), lays down the same rule:

"An armistice, truce or other suspension of hostilities, binds the contracting parties *from the date* of its conclusion."

This rule also accords with the general principle that licences granted during war do not act retrospectively (2 *Halleck Int. Law*, Baker's Ed., p. 360).

(**b**.) Under the Queen's Order in Council, 1854, issued shortly after the beginning of the Crimean war, and from which this section of the President's proclamation is derived, the immunities accorded to Russian vessels attached on and from the date of issue; and the same rule was followed in the French and Russian proclamations, though war existed before the date of any of them.

The Queen's Order, dated March 29th, 1854 (App. B,

*post* p. 42), which, for purposes of comparison, may be set opposite the similar provision in the President's proclamation, was as follows:

*Queen's Proclamation.*

Russian merchant vessels, in any ports or places within her Majesty's dominions, shall be allowed until the tenth day of May, next, *six weeks from date hereof*, for loading their cargoes and departing from such ports or places; and that such Russian Merchant Vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, that nothing herein contained shall extend or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

*President's Proclamation*

4. Spanish merchant vessels in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places, and such Spanish merchant vessels, if met at sea by any United States ships, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government.

The French proclamation of March 27, 1854 (App. C., *post*, p. 43), also became operative only from its date:

ART. 1er. Un delai de six semaines *à partir de ce jour* est accordé aux navires de commerce russes pour sortir des ports français.

En conséquence, les navires de commerce russes, qui se trouvent actuellement dans nos ports, ou ceux qui, étant

sortis des ports russes antérieurement à la déclaration de guerre, entreront dans les ports français, pourront y sejourner et compléter leur chargement jusqu'au neuf mai inclusivement.

The Russian decree was dated April 19, 1854. Though it stated no date for the commencement of its effect, the implication is that this was on the day of its date:

Un delai de six semaines est accordé aux navires de commerce anglais et français qui se trouvent dans nos ports pour effectuer leur chargement et faire voile sans empêchement pour l'étranger. Dans les ports de la mer Noire, de la mer d'Azoff et de la mer Baltique ce delai sera compté a partir du 25 avril courant: et dans les ports de la mer Blanche à partir du jour où la navigation aura été ouverte dans chacun d'eux (App. D, p. 44).

It is seen by reference to these previous practices, not only that the decrees of grace to shipping have not been impliedly retroactive, but that by express terms they have been given effect from their date, which, like that of the President's proclamation, was subsequent to the existence of war.

The Queen had recognized the existence of war by her earlier Order of March 28th (App. A., *post*, p. 41), and the French proclamation was dated March 27th.

Nothing but difficulty is encountered in attempting to carry the date of effect back of the date of issue. The reasons for carrying it back to April 21st are equally if not more cogent in support of the claim that it should date back to the 20th or the 19th.

The date of *expiration* of the privileges accorded was expressly fixed at May 21st. If the beginning of the effect was on April 26th the period of grace would have been twenty-five days. But as it was not said expressly that this was intended as the period, the District Judge read into the proclamation an intention to have its privileges apply only to vessels which were actually in ports or places of the United States *on April 21st*, construing the first clause so that it should read: "Spanish merchant vessels in any ports or places within the United States

[on April 21st, 1899], shall be allowed till May 21st, inclusive, for loading their cargoes and departing from such ports and places," &c.

By that construction he excluded the *Panama* from the exemption intended to be conferred by this section, for the reason, as he held, that she was not within a port or place of the United States on April 21st (Opinion, pp. 27, 28).

(c.) If there be any valid doubt as to when this section of the proclamation became effective, it should be construed liberally in favor of the claimant.

Such is the rule laid down in a number of similar cases which arose under the Queen's proclamation in 1854.

In The *Phœnix*, Spinks' Prize Cases, p. 5, Dr. Lushington first dealt with this matter:

"Much of the argument in the present case has turned upon that document which bears date the 29th of March last, and which immediately succeeds an order in council for preventing vessels clearing out for Russia, and ordering, as is customary in all wars, a general embargo or stoppage of enemies' vessels. Now upon what princ.ple am I to put a construction upon this document? I am perfectly free to confess that I think it to be quite clear that whenever the Government of Great Britain or of any other country, by a public document in the nature of an order in council, *relaxes the severity of belligerent rights*, it ought to be taken *in favor of the party for whom it is intended, and that a liberal construction should be put upon it*. If it were necessary to confirm my opinion by authority, I could resort without difficulty to that of Lord Stowell. However, it is perfectly clear that that is the true principle. When discussion arises with regard to the intention of those from whom the document emanates, we can only look for that intention to the words in which they express it. The principle being to put upon the words *the most extensive interpretation which is consistent with them*, I take it for granted there must be words in the document sufficient to justify that interpretation. I am not at liberty to travel out of the document. *If the words of the document are capable of two constructions, then I am clearly of the opinion that the one most favorable to the belligerent party in whose favor the document is issued ought to be adopted;* but the Court must bear in mind that

its province is not *jus dare*, but *jus dicere;* and I must again refer to the principle which I have often enunciated in this Court: *verbis plane expressis omnino standum est.*"

The same learned Judge in The *Argo* (Spinks' Prize Cases, p.52), said:

"I am of opinion that all relaxation of belligerent rights emanating from the Government of this country, and declared in authentic documents, should receive a liberal construction—as liberal a construction as the terms of those documents will admit of."

(**d**.) There can be no question of the *power* of the Executive to exempt from condemnation all Spanish merchant vessels in our ports on April 26th.

The fact that the *Panama* had been previously captured and brought into port, and was under libel on that day is immaterial. It is clearly settled that no rights of the captors had attached up to that date. They have no rights which the Executive may not wholly disregard at any time prior to a decree of condemnation. Mr. Justice Nelson stated this fact most emphatically in the *Aigburth*. Blatchford Prize Cases, 635, 637:

"All captures made by public armed vessels belong to the Government. By the laws of Congress, after the condemnation of prize property, a portion of the proceeds is distributed among the officers and crew of the capturing vessel in proportions depending upon the relative forces of that vessel and of the captured vessel. Still the whole property is proceeded against in behalf of the Government. No title exists in the captors except to the distributive share of the proceeds after condemnation; and, *until then, the captors have no interest which the Court can notice for any purpose.*"

To the same effect are *Stevens* v. *Bagwell*, 15 Vesey, 139; 2 *Halleck, Int. Law*, Baker's Ed., 363; *Davis, Int. Law* 261; *Boyd's, Wheaton*, p. 489.

(**e**.) There are strong reasons why the Executive should be deemed to have intended to release the *Panama* by proclamation.

She had been engaged regularly in trade with New York, carrying the mails to and from that port. A contractual relation for that service was in force between her owners and the United States. She had received the usual clearance from a government officer on April 20th, when there was as much actual war as there was on the 21st, and from another officer had received the mail bags for Mexico. In reliance upon the voluntary clearance, and the implied obligation of the Government, under the mail contract, to permit her to proceed to final destination, she had sailed on a voyage skirting our coast, guided by our lighthouses, passing at times along the Florida coast within our undoubted sovereignty over the marine league of territorial waters, and had steamed directly into the blockading squadron placed in Cuban waters after her departure.

The clearest possible encouragement of the Government actually led to her capture, without previous notice of war, or any opportunity to proceed homeward and separate herself, as a merchant vessel, from the theatre of hostilities between war ships. It is but natural and just to suppose that the Executive would wish to show clemency to a vessel thus virtually lured into captivity.

It is no answer to say that the President might have gone further and given specific orders for the discontinuance of the prize cause. Considerations of policy may have made that step inadvisable. The Executive announced the liberal principles on which the war should be conducted, and made specific provisions relative to the exemption of enemy merchant ships from condemnation. It is proper that the Courts should determine the effect of the proclamation in particular cases.

From the fact that the President, by aproviso, excluded certain vessels from the privileges conferred upon others, and did not include previously captured ships amongst those excluded, the conclusions must be that such vessels, if otherwise within the proclamation, were intended to be freed.

(f.) The general object of the proclamation, as stated in the preamble, and in the more specific rules, was to pro-

vide that the war should be conducted in accordance with the modern views of nations and their recent practices.

Under such practices the right to capture enemy merchant ships has generally been postponed until merchant shipping has had notice of a state of war. The proclamation should be construed in the light of this fact.

*Calvo*, 4 *Droit International* (5th Ed.), p. 46, quotes with approval the following passage from Hautefeuille on this subject:

"Hautefeuille insists particularly upon the necessity for a special preliminary declaration in the case of a maritime war; 'notice must be given to navigators of the cessation of a state of peace, in order that they may not leave port without taking the precautions needful to avoid danger, and that they may not become the prey of an enemy at the moment when they think they are meeting a friend.' 'Hostilities,' he says, 'committed previous to a declaration of war, or notification of every other equivalent act, indicating the time of the commencement of war, are, in my eyes, violations of the rights of the nation attacked, and of the law of nature. Such violations are all the more culpable because they cannot be rested upon any provisions of the secondary law, upon any custom, or upon any international usage. * * * Every enterprise of that nature is an act of brigandage, which should place its author under the ban of nations, and bring upon the wrongdoers the punishments reserved for pirates.'"

A negative circumstance of importance here is that modern instances are not found of captures made under similar conditions.

A "practice" is not necessarily a custom in the sense in which customs are referred to in municipal law. What has been done by other powers in recent wars is a recent "practice" within the sense of the preamble; and a practice may be negative as well as positive.

It was formerly the practice to seize the persons of enemies on land and detain them as prisoners of war; to confiscate their property and debts due to them, even when contracted in peace. As a matter of strict right, some, if not all, of these things may still be done; but the recent "practice" is not to do any of them (1 *Halleck Itn.*

*Law*, by Baker, pp. 530-539). The laws of war have been modified and changed with advancing civilization. And as such captures have not been made in recent wars, it may be taken that there is now a practice not to exert the forme rright of capture until after merchant shipping has had full notice.

It is interesting to observe that in the most recent book on the subject—*Owen's Declaration of War*, London, 1889--though the abstract right to capture an enemy's floating property immediately on the acknowledged outbreak of war is stated, no reported case is referred to where a capture was made without previous notice by the captors' country to shipping that a state of war existed (pp. 60, 61). On the contrary, the author lays particular stress on the modern practice of giving notice and affording merchant vessels an opportunity of removing themselves from the regions of hostilities (pp. 54, 55).

(g.) If, however, the proclamation is not held to have become effective on April 26th, then a liberal construction of it should be adopted, having regard to the purpose and intent of the whole proclamation, its objects and aims, and designed to give effect to such objects, rather than one which reads into it a date (April 21st) which would defeat them.

Even though effect be given to it, by relation, anterior to its date (April 26th), it would not follow that the retroactive force should stop at April 21st. No date was expressly fixed for the commencement of immunity. The omission of such date implies either that it was to have force only from its issue, or that it was to include all merchant ships in our ports, or which might have been, or might come in them, before May 21st, the date the immunity expired. The latter construction would perhaps correspond better with the root idea of notice, which underlies the proclamation.

The apparent purpose of the document was to prevent the capture and condemnation of Spanish merchant vessels which might come innocently, and by our encouragement, within our grasp, without knowledge that war had broken out, and without an opportunity, based upon

such knowledge, of separating themselves fully from the conflict and avoiding the risks of capture. Thus, by the Fifth Section, Spanish vessels, which, prior to April 21st, had sailed from any foreign port bound for our ports, were exempted; and by the Fourth Section, a corresponding exemption was doubtless intended to be given to vessels in our ports, or which might have left our ports in ignorance of the war, and were found in waters where, through ignorance, they were liable to capture before an opportunity was given them to leave the theatre of war.

A liberal construction of the proclamation, in the sense in which Dr. Lushington laid down the rule, requires a construction in accordance with its spirit and intent, so that all vessels similarly situated shall have the same exemption. It is illogical and absurd to say that the *Panama* would have been exempt from condemnation if she had not sailed until April 21st, but that because she sailed on the 20th she must be condemned. The Court may reject any construction which would lead to illogical or absurd results. At least such results ought not to be reached through construction, or by reading in a date not expressed.

(**h.**) The Proclamation should be construed with due regard to our traditional policy towards the question of the exemption of private property, at sea, from capture during war.

From the administration of President Munroe, down to the present time, the Executive Department of the Government has consistently and persistently maintained, and has urged upon other Governments, the principle that private property at sea, as on land, should be exempt from capture during war. The messages and correspondence on this subject are collated in 3 *Wharton's International Law Digest*, Section 342.

These views have also been embodied in the treaties with Bolivia in 1858 (*Treaties and conventions between the United States and other Powers*, pp. 90, 93, Art. IX.), and with Italy in 1871. Article XII. of the latter is as follows:

"The high contracting parties agree that, in the unfortunate event of a war between them, the private property

of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by the armed vessels or by the military force of either party, it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party" (*Treaties and Conventions between the United States and other Powers*, pp. 581, 584).

The refusal of the United States to subscribe to the Declaration of Paris in 1856 was based in part on the failure of the other Governments to follow our lead upon this point (2 *Halleck's Int. Law* [*Baker's Ed.*], p. 81). Mr. Marcy, writing to Mr. Seibels July 14, 856, said:

"The objections by the Government of the United States to the declaration of the Paris conference of 1856 are that (1), 'All the four propositions must be taken or none'; (2) they limit the future sovereign power of the parties concerned; (3) they exact the surrender of privateering, a surrender the United States cannot make; (4) they do not exempt private property of non-belligerents from confiscation" (3 *Wharton's Int. Law Dig.*, Sec. 342, p. 268)

Successive Presidents and Secretaries of State have emphasized the desirability of the general adoption of this principle, from the earliest times down to the present day; and President McKinley, whose proclamation of April 26th declared that the war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, is himself an advanced advocate of the doctrine. In his second annual message to the Senate and the House of Representatives, dated December 5, 1898, after the conclusion of the war with Spain, his views on this point were expressed in these words:

"We desire, in common with most civilized nations, to reduce to the lowest possible point the damage sustained in time of war by peaceable trade and commerce. It is true we may suffer in such cases less than other communities, but all nations are damaged more or less by the state of uneasiness and apprehension into which an outbreak of hostilities throws the entire commercial world. It should be our object, therefore, to minimize, so far as

practicable, this inevitable loss and disturbance. This purpose can probably best be accomplished by an international agreement to regard all private property at sea as exempt from capture or destruction by the forces of belligerent powers. The United States Government has for many years advocated this humane and beneficent principle, and is now in position to recommend it to other powers without the imputation of selfish motives. I therefore suggest for your consideration that the Executive be authorized to correspond with the governments of the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerent powers" (*Messages and Papers of the Presidents*, Vol. 10, pp. 191, 192).

It is believed that the delegates appointed by the President to the recent Peace Conference at the Hague were instructed to and did endeavor to obtain the assent of that Conference to the general adoption of these principles.

This attitude of the Government towards private property at sea in time of war, so long maintained and adopted by the present Executive, should lead the Court to regard the proclamation as a benevolent design to afford immunity from capture to all vessels over which its protection, by the most liberal interpretation, can be extended.

(**2.**) *The steamer is not within the proviso which excludes certain classes of vessels from the immunities granted by this section.*

(**a.**) There were no Spanish military or naval officers on board the vessel.

Twenty-nine passengers embarked on the steamer at New York; but, so far as appeared or was known, none of them was in the military or naval service of Spain. (Ans. to 26th Int., pp. 24, 28, 32).

(**b.**) The ship carried no contraband.

She carried a general cargo, much of which has been restored to its owners without suspicion that it was of unlawful character. That which was condemned was sold under the direction of the Court at Key West and

New York, and, so far as appears or is known, did not comprise any that was contraband.

The guns which the ship carried under the requirements of her mail contract and for the protection of the mails, are not to be regarded as contraband or munitions of war, within the sense of this section.

Contraband, as here referred to, means contraband cargo, not contraband portions of the ship's permanent equipment.

If the furnishings of a ship could be regarded as contraband, every ship would have contraband on board.

The large guns she carried had been mounted three years before her capture, the twenty Remingtons had been on board many years, and the ten Mausers had been shipped about a year before (Ans. to 31st Int., p. 33).

The purser and the master both testified that these guns were on board the ship pursuant to the contract with the Spanish Government, which required the ships to be fitted with such guns for the protection of the mails (Ans. to 31st Int., pp. 25, 33). The article of the contract was stated by the master to the prize commissioner (p. 33). In the test affidavit the terms of this contract are stated (pp. 5 and 6), and a large printed book, containing the entire contract, was produced and filed by the master with his supplementary test affidavit (pp. 8 and 9). That book is now on file in this Court.

It was decided by the French Council of Prizes, in 1801, that the presence of mounted guns on board a vessel, forming a part of her ordinary equipment, constituted no ground for seizure and condemnation, if she would have been exempt from seizure without them (*Pistoye et Duverdy, Des Prises Maritimes*, Vol. 2. p. 51).

In view of the contention of one of the briefs filed for the captors, that the *Panama* should not be deemed a merchant vessel, within the meaning of the proclamation, an extract from the decision in *Le Pégou* (*supra*), will not be inappropriate:

"For my part, I think, having arms on board and mounted, is not of itself sufficient to justify the charge that the vessel is armed for war.

"Armament for war is a preparation purely offensive. It is proved when there is no other object in the armament but that of attack, or when the circumstances indicate that such is the principal aim of the enterprise. Then the vessel is rated an enemy or a pirate, if not furnished with documents capable of removing all suspicion.

"But defense is a natural right; and the means of defense are legitimate in sea voyages as in other perilous undertakings in life. A ship which has but a small crew and carries a considerable cargo is evidently destined for commerce, and not for war. The arms found on such a ship are not deemed to be for plunder or hostilities, but to prevent them; not for attack, but for defense" (*Le Pégou*, 2 Pist. & D., 51).

(**c**.) None of the questions in the standing interrogatories was designed to elicit an answer as to whether the ship carried any dispatch of or to the Spanish government; but the whole of the papers on board the ship, including the mails, were seized and delivered over to the captors, and no such message appeared amongst them. There has been no contention, hitherto, that the ship contravened the provision in this regard.

(**d**.) There was no question in the standing interrogatories on the subject of coal. But there was no finding below that the ship carried more coal than was reasonably required for her voyage.

(**e**.) Merchant vessels previously captured and brought into ports, on or before April 26th, are not expressly, like certain other classes of ships, excluded from the benefits of the proclamation, and hence must be deemed included in it.

The conclusions upon this branch of the argument are (1) that the proclamation took effect from its date; (2) that the *Panama* was within its plain terms; (3) that she was not amongst the classes of vessels in terms excluded from its benefits, and (4) that in the circumstances, she is not to be impliedly excluded from it, but on the contrary is entitled to the immunity it accords, and that accordingly her proceeds should be restored.

## II.

**If, notwithstanding the above considerations, the decision must be that the immunity granted by the proclamation was designed to relate to enemy ships in our ports on the outbreak of war, instead of to those in our ports on April 26th, when it was issued, then it should be deemed to relate back to and including April 20th, the date the Panama sailed.**

Just when the war in fact began would be difficult to say. The point has been discussed in the brief for the *Buena Ventura*.

Assuming, however, for this argument that, in view of the declaration by Congress, it must be taken that a state of war existed as early as April 21st, then it must logically follow that it existed on the 20th also. The congressional statement that war existed on the 21st does not preclude an inquiry as to whether it did not exist on the 20th.

The immediate cause of hostilities was the joint resolution of April 20th (*ante*, p. 6).

It seems plain that nothing constituting an act of war was done on the 21st which did not find its counterpart in what occurred on the 20th.

On that day the resolution was communicated to the Spanish Minister in Washington, who at once demanded and received his passports.

It was also on the same date sent as an open cable message to Spain. The refusal of Spain to receive the resolution on the 21st was not war; nor was it so warlike as our act in passing and sending it on the 20th.

The remark in Signor Gullon's letter to Mr. Woodford of April 21st that the resolution "is equivalent to an evident declaration of war," and the statement that the Spanish Minister at Washington had been withdrawn in consequence of it seems to treat our actions of April 20th as amounting to a declaration of war. It must be conceded that the resolution was, of itself, distinctly

hostile. The concluding sentence of Mr. Sherman's message of April 20th even announces when hostilities are to begin:

"If by the hour of noon on Saturday next, the 23d of April, instant, there be not communicated to this Government by that of Spain a full and satisfactory response to this demand and resolution whereby the ends of peace in Cuba shall be assured, the President will proceed without further notice to use the power and authority enjoined and conferred upon him by the said joint resolution to such extent as may be necessary to carry the same into effect."

The despatch of this message, after the Government understood, from the action of the resident Minister, that the demand made in it could not be accepted, in that form, by Spain, may have been regarded by Congress as amounting to a declaration to Spain that hostilities would be commenced three days later. In that view it may be regarded as a declaration of war, with notice of the time hostilities would begin.

It is not, however, a specific declaration of war, or at least would probably not be so regarded if the resolution of April 25th had not announced that war existed on the 21st. But if that declaration is conclusive of the fact, it appears logically to lead right back to the resolution and commmunications of April 20th as the beginning of war, and necessarily to make that a day of the war. For there is no substantial legal difference between the acts committed on those two days which would justify a court in saying the 20th was not a day of war if the 21st was such a day.

And if the 20th was a day of war, and the proclamation relates back to the beginning of war, it should protect the *Panama* because she sailed on that day.

## III.

**The steamer was exempt from capture by and under the terms of the sixth section of the proclamation of April 26, 1898.**

This section provided:

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and *the voyages of mail steamers are not to be interfered with* except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

The evidence and the test affidavits show that the *Panama* was a mail steamer, having a contract with the Spanish government for the carriage of mails, and was, by a specific provision of its contract, required to be armed for their protection.

The United States placed its mails on the steamer in New York on April 20th.

This also must have been pursuant to some contract between the shipowners and our own government.

The shipment of the United States mails by the *Panama* at New York is clearly proved.

The log under that date states the fact that the ship "sailed from New York to Havana at 2:30, *with mails*, pilot and passengers aboard." It further states, under date of April 25th: "At 11:15 the officer asked for the key of the mail room, which was given him." And the master (in Ans. to the 20th Int.) testified: "All the papers and *mail* of the ship were delivered to the prize master; none was delivered to anybody else."

It was stated in the test affidavit to be a part of the ship's usual business, in her trade, to carry the mails between ports of the United States, Cuba, Mexico and South America (p. 5).

The Post Office Department in New York, in the Post Office notice published in the newspapers on April 20th (Appendix E, *post*, p. 45), advertised the act that mails for Mexico would be dispatched on that

day per S. S. *Panama*. And if the Court had not denied the motion for further proof, the claimant could have shown by the Postmaster at New York, also, that the United States mails were actually dispatched by the *Panama* (*Correspondence with Postmaster, Appendix E, pp.* 46, 47).

The language of this section of the proclamation does not exclude its application to mail steamers under the Spanish flag, nor is such an exclusion to be implied.

Under the principles to be applied in the interpretation of executive relaxations of belligerent rights, mail vessels under the Spanish flag should be deemed to be within this section if the words will admit of that interpretation.

The construction of the section must be as liberal and favorable to the Spanish belligerent as the words will admit of.

If it had been intended to have this privilege apply to neutral vessels only, it would presumably have been so stated. To exclude the *Panama* from the privileges accorded to mail steamers under this section would be, in effect, to say that the President meant to grant immunity to neutral vessels carrying the mails of other nations, but to have a vessel carrying our own mails captured, after it had deliberately, pursuant to contract, and at the threshold of the war, placed them upon such vessel.

The shipment of mails on the *Panama* by the authority of and under some form of contract with the United States on the 20th of April, at the outset of the war, implied an obligation on the part of the Government to permit the vessel to proceed to her ultimate destination. That destination, according to the clearance and the evidence, was a port in Mexico, a neutral State Having instituted a blockade of the Port of Havana, to which the vessel was first bound, it was proper to prevent her from entering there; but this of itself was no bar to her proceeding to her Mexican destination.

The outbreak of war during the voyage should not be held to justify the revocation of the contract between the Government and the steamer for the carriage of the mails to Mexico, and the capture of the ship after she had sailed upon the voyage in reliance upon the contract, and had

partly performed and fulfilled it. Sailing with the United States mails, and presumably under a mail flag, the vessel was to a certain extent in the public service of the United States. She was encouraged by the act of the Government to place herself in a position which proved to be one of danger, and accordingly had special claims upon the clemency of the Executive.

The strongest reasons exist for granting immunity to a vessel in her situation. The proclamation should be deemed to extend to her case unless she is necessarily excluded from it by its expressed terms.

The *Panama* is not excluded from the immunity granted under this section by carrying contraband, or attempting to violate the blockade.

Her cargo has been sold by the government, and no contraband was found amongst it. That she was not attempting to violate the blockade is manifest from her immediate surrender, without resistance, to the *Mangrove*. The District Judge, who examined the large mass of documents found aboard the vessel, only a small proportion of which have been certified here, found no ground for condemning the ship, except that she was enemy's property.

## IV.

**If the facts in connection with the defense of immunity by reason of the mail contract be considered as in doubt on the preparatory evidence, or if the terms of the mail contract between the shipowners and the Spanish Government are not sufficiently proved, the Court should order further proof.**

The rule with regard to further proofs is stated by Mr. Justice Story in his essay on the *Practice in Prize Cases* (1 Wheat., Appendix, pp. 494, 504) as follows:

"The most ordinary cases of further proof are where the cause appears doubtful upon the original papers and

the answers to the standing interrogatories; and in such cases, if the parties have conducted themselves with good faith, and the error or deficiency may be referred to honest ignorance or mistake, the court will indulge them with time to supply the defects by the introduction of new evidence. But further proof is in no case a matter of right, and rests in the sound discretion of the Court. Further proof is in all cases necessary, * * * where the defects of the papers, the conduct of the parties, the nature of the voyage, or the original evidence in general, induces any doubt of the proprietary interest, the legality of the trade or the integrity of the transaction."

Further proof may be allowed upon appeal, as well as in the trial Court. This Court has frequently ordered new proofs where the right disposition of the cause was left in doubt by the record (The *Mary*, 9 Cranch, 126, 140; The *Frances*, 8 Cranch, 354; 9 do., 183; The *Venus*, 1 Wheat., 112; The *London Packet*, 2 Wheat., 372; The *Sally Magee*, 3 Wall., 451).

## V.

**The restoration of the ship should be accompanied by damages.**

Every marine capture is at the peril of the captors, who must show just grounds for the detention or condemnation of the ship, or be liable for damages (The *Resolution*, 2 Dall., 1; The *Grand Sachem*, 3 Dall., 333; The *Charming Betsy*, 2 Cranch, 64; *Maley* v. *Chattuck*, 3 Cranch, 458; The *Amiable Nancy*, 3 Wheat., 546; *British Consul* v. *Thompson*, Bee., 142). If, however, there was probable cause for the capture or the subsequent detention, it is proper to submit the cause for adjudication before the prize tribunal, and no damages will be recoverable though the Court should acquit without the formality of ordering further proof (The *Olinde Rodrigues*, 174 U. S., 510; The *George*, 1 Mason, 26).

The question of damages in the present case will depend

upon the ground on which the restoration, if decreed, is placed.

If the Court be of opinion that the capture without previous notification of war was premature, and not in accordance with recent practices, the original taking would amount to a trespass.

If the ship is ordered to be restored because she is exempt from condemnation under the terms of the President's proclamation, it would seem that the detention of the ship subsequent to the proclamation, and the wrongful continuance of the prize proceedings should be held to be at the risk of the captors, and that the great damages suffered by the claimant on account of the condemnation and sale of the ship far below her real value, and for the loss of her use, &c., should in justice be made good to them.

## Last Point.

**The decree of the Court below should be reversed and proceeds of the ship should be restored with damages and costs.**

New York, October 30, 1899.

Respectfully submitted,

CONVERS & KIRLIN,
*Proctors for the Claimant-Appellant.*

J. PARKER KIRLIN,
*Advocate.*

# Appendix A.

## I.

### Declaration of Her Majesty, dated March 28, 1854, with reference to Neutrals and Letters of Marque.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an Ally, is desirous of rendering the war as little onerous as possible to the Powers with whom she remains at peace.

To preserve the commerce of Neutrals from all unnecessary obstruction, Her Majesty is willing for the present to waive a part of the belligerent rights appertaining to her by the Law of Nations.

It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing Neutrals from bearing the Enemy's despatches, and she must maintain the right of a belligerent to prevent Neutrals from breaking any effective blockade which may be established with an adequate force against the Enemy's forts, harbours, or coasts.

But Her Majesty will waive the right of seizing Enemy's property laden on board a neutral vessel, unless it be contraband of war.

It is not Her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board Enemy's ships; and Her Majesty further declares, that being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organised forces of the country, it is not her present intention to issue Letters of Marque for the commissioning of Privateers.

Westminster, March 28, 1854.

(Holland, Manual of Naval Prize Law, p. 119).

## Appendix B.

At the Court at Buckingham Palace,
the 29th day of March, 1854.
Present,
The Queen's most Excellent Majesty in Council.

Her Majesty, being compelled to declare war against his Imperial Majesty the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof, is pleased by and with the advice of her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels, in any ports or places within her Majesty's dominions, shall be allowed until the tenth day of May, next, six weeks from date hereof, for loading their cargoes and departing from such ports or places; and that such Russian Merchant Vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall extend or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

And it is hereby further ordered by her Majesty, by and with the advice of her Privy Council as aforesaid, that any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

And the right honourable the Lords Commissioners of her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

C. C. GREVILLE.

## Appendix C.

FRENCH PROCLAMATION OF MARCH 27, 1854.

ART. 1er. Un delai de six semaines à partir de ce jour est accordé aux navires de commerce russes pour sortir des ports français.

En conséquence, les navires de commerce russes, qui se trouvent actuellement dans nos ports, ou ceux qui, étant sortis des ports russes antérieurement à la déclaration de guerre, entreront dans les ports français, pourront y sejourner et compléter leur chargement jusqu'au neuf mai inclusivement.

ART. 2. Ceux de ces navires qui viendraient à être capturé par les croiseurs français aprés leur sortie des ports de l'empire, seront relâchés, s'ils établissent, par leurs papiers de bord qu'ils se rendent directement à leur port de destination, et qu'ils n'ont pu encore y parvenir.

*Le ministre des affaires étrangères.*

DROUYN DE LHUYS.

(Pistoye et Duverdy, Des Prises Maritimes II., 467–8).

## Appendix D.

RUSSIAN PROCLAMATION OF APRIL 19, 1854.

(*Avis du ministre des finances de Russie No. 4 de la Gazette du Commerce du 19 avril.*)

Prenant en considération les déclarations des gouvernements anglais et français, le gouvernement impérial dans son désir sincère d'écarter autant que possible des particuliers les conséquences désastreuses de la guerre, a arrêté les règles suivantes:

Un delai de six semaines est accordé aux navires de commerce anglais et français qui se trouvent dans nos ports pour effectuer leur chargement et faire voile sans empêchement pour l' étranger. Dans les ports de la mer Noire, de la mer d'Azoff et de la mer Baltique ce delai sera compté a partir du 25 avril courant: et dans les ports de la mer Blanche à partir du jour où la navigation aura été ouverte dans chacun d'eux.

Les navires de commerce anglais et français qui après être sortis de nos ports seront rencontrés en mer par nos croiseurs, même après l'expiration du delai fixé, en obtiendront la permission de continuer leur voyage du moment que l'examen de leurs papiers de bord aura prouvé que leur cargaison a été embarqué avant l'expiration de ce delai.

(Pistoye et Duverdy II, 471.)

## Appendix E.

I.

(*N. Y. Tribune*, Wednesday, April 26, 1898.)

"POST OFFICE NOTICE.

"(Should be read daily by all interested, as changes may occur at any time.)

"Foreign mails for the week ending April 23, 1898, will close (promptly in all cases) at the general post office as follows:

Parcels post mails close one hour earlier than closing time shown below.

"TRANSATLANTIC MAILS.

"WEDNESDAY—At 9 A. M. (supplementary 10.30 A. M., for Europe), per S.S. Majestic, via Queenstown; at 10 A. M. for Europe per S.S. Kensington via Southampton (letters must be addressed 'per Kensington'). * * *

"MAILS FOR SOUTH AND CENTRAL AMERICA, WEST INDIES, ETC.

"WEDNESDAY—At 1 A. M. for Jamaica per steamer from Philadelphia; at 2.30 A. M. for Brazil and La Plata countries via Rio Janeiro per S.S. Dalecarlia from Philadelphia (letters must be directed 'per Dalecarlia'); at 11 A. M. for Progresso per S. S. *Panama* (letters for other parts of Mexico must be directed 'per Panama); at 12 M. (supplementary, 1 P. M. for Central America, &c.); * * *

"TRANSATLANTIC MAILS.

"Mails for China, Japan and Havana per S.S. City of Rio Janeiro (from San Francisco) close here daily up to April 24th at 6.30 A. M. * * *

"CORNELIUS VAN COTT,
"Postmaster.

"POST OFFICE, NEW YORK, N. Y.

"April 25, 1898."

II.

(Copy.)

NEW YORK, Oct. 18, 1899.

Hon. CORNELIUS VAN COTT,
Postmaster, New York City.

S/S *Panama.*

Dear Sir:

Will you kindly inform us whether the steamship *Panama*, which sailed from New York, April 20th, 1898, and was subsequently captured by the fleet engaged in the blockade of Havana, on or about April 25th, 1898, carried the United States mail? Will you also kindly inform us, if possible, what disposition was made of her mails after her capture?

Yours faithfully,
CONVERS & KIRLIN.

III.

(Copy.)

Indexed.—"S. S. 'Panama,' Mail of."

POST OFFICE, NEW YORK, N. Y.
Second Division, Mailing and Distribution,
Office of Supt. of Mails,
October 20th, 1899.

Messrs. CONVERS and KIRLIN,
5 Beekman St.,
New York, N. Y.

Gentlemen:

In reply to your letter of the 18th instant I have to inform you that the S. S. "Panama" of the Spanish Transatlantic Line carried mail from this office on the trip referred to. She was captured off the coast of Cuba and it is presumed that the mail aboard was sent to the Dead Letter Office, Washington, D. C. This office received similar inquiries at the time regarding the fate of the mail in question and tried to ascertain exactly how it had been disposed of but was not able to elicit any official information on the subject.

Very respectfully,
C. VAN COTT,
Postmaster.
per E. M. MORGAN,
Asst. P. M.